Supreme Court, U.S.
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No. 88-998

In the Supreme Court of the United States

OCTOBER TERM, 1988

CRAIG E. CALDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment on the ground that a written agreement providing for an indefinite extension of the statute of limitations was invalid.

On May 6, 1986, petitioner was advised that an indictment against him was to be presented to a grand jury in the United States District Court for the Central District of California on May 13, 1986, within the applicable statute of limitations. Thereafter, petitioner's attorney prepared a series of three waivers of the statute of limitations that petitioner signed. Petitioner waived the statute of limitations so that he would be afforded extra time to argue against the return of the indictment. The second and third waivers drafted by petitioner's attorney did not contain an expiration date. Subsequently, on September 9, 1987, petitioner was charged in an indictment with various crimes arising out of transactions of the Western National Bank, of which he was Chairman of the Board and majority shareholder.

On January 11, 1988, the district court dismissed the indictment on the ground that a waiver of the statute of limitations could not be open-ended but had to state expressly that it was only for a fixed period of time. Accordingly, the court ruled that the agreements providing for an indefinite extension of the statute of limitations were invalid. Pet. App. 8a-13a.

The court of appeals reversed (Pet. App. 1a-7a). Noting that the statute of limitations is not jurisdictional and can be waived, the court ruled that neither case law nor public policy warrants special treatment of open-ended waivers. The court of appeals concluded that the waiver in this case should be enforced because petitioner "does not claim that the indictment was unnecessarily delayed after the waiver or that the prosecutor acted in bad faith in agreeing to the waiver" (Pet. App. 6a).

Petitioner contends (Pet. 7-23) that the applicable statute of limitations, 18 U.S.C. 3282, precludes an agreement between the government and a defendant suspending the five-year limitations period. Petitioner also contends (Pet. 23-28) that an open-ended agreement may not be enforced in the absence of a showing of a particularized need for the open-ended suspension. Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the

court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1989

* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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